Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1979

No. 79-1075

TYRONE GUYTON, a deceased minor, by MATTIE SHEPHERD, Administratrix of the Estate of TYRONE GUYTON, deceased,
Petitioner,

vs.

D. LOWELL JENSEN, CHARLES EDWARD HERBERT, DONALD WHYTE, LAWRENCE HOLMAN, EDWARD HILLIARD, GEORGE T. HART, THOMAS DONAHUE, WALLER PRENTICE, CONRAD BLEVINS, JOHN ROBERT LOTHROP, and JAMES F. DONOVAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner Tyrone Guyton, a deceased minor, by Mattie Shepherd, his natural mother and Administratrix of the Estate of Tyrone Guyton, deceased, respectfully prays that a writ of certiorari issue to

review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit entered on August 6, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is attached hereto as Appendix A. The order of the Court of Appeals, denying petitioner's Petition for Rehearing, is attached hereto as Appendix B. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 16, 1979. Petition for Rehearing was filed on August 29, 1979, and, by Order filed October 29, 1979, petition for rehearing was denied. This petition for certiorari was filed within 90 days of said order of denial. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where city police officers conspire to and in fact inflict bodily harm on a 14-year-old black youth, and thereafter kill him for the purpose of concealing their wrongful acts, and conspire together and with investigative city police officers and agents of the county prosecuting attorney's office to conceal their wrongful acts, with the purpose and intent of depriving the deceased youth of his life without due process

of law, and of depriving him of rights and privileges secured by the United States Constitution and criminal justice laws, are those city and county officers and agents who join such conspiracy knowing of its purposes and actively furthering its ends relieved of liability under U.S.C. §1983 by reason of the death of the youth prior to their joining the conspiracy?

2. Are such city and county law enforcement officers who, knowing of its purposes, join a conspiracy to impede, hinder, obstruct and defeat the due course of justice, and who themselves so conspire and act to further the ends of such conspiracies, relieved of liability under 42 U.S.C. §§1983 and 1985(2) by reason of the death of such youth prior to their joining the conspiracy?

3. Are such city and county law enforcement officers who, knowing of its purposes, join a conspiracy to deprive such youth and his duly appointed legal representative and natural mother of the equal protection of the laws, and of equal privileges and immunities under the laws, and who themselves so conspire and act to further the ends of such conspiracies, relieved of liability under 42 U.S.C. §1985(3) by reason of the death of such youth prior to their joining the conspiracy?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions and statutes involved are, United States Constitution, Amendments V, VI, and XIV, Sec. 1, and 42 U.S.C. §§1981, 1983,

1984, 1985, 1986, and 1988, set forth in full text in Appendix C attached hereto.

STATEMENT OF THE CASE

This is an action for damages under the Civil Rights Acts brought by the deceased youth, Tyrone Guyton, by the duly appointed representative of his Estate, Mattie Shepherd, his mother and Administratrix.

The action initially was filed against three police officers, the defendants Dale Phillips, Thomas Mierky, and William Mathews, and their commanding officer, Chief of Police James F. Donovan. All four defendants were employed by the City of Emeryville, a municipality in the State of California. On the basis of information developed following the filing of the original complaint, petitioner moved the court for leave to file an amended complaint bringing in as new parties defendant the respondents John Robert Lothrop, Conrad Blevins, Waller Prentice, Thomas Donahue, George T. Hart, police officers employed by the City of Oakland, a municipality of the State of California, Edward Hilliard and Lawrence Holman, inspectors employed by the County of Alameda, a political subdivision of the State of California, Donald Whyte and Charles Edward Herbert, Deputy District Attorneys employed by the County of Alameda, and D. Lowell Jensen, the elected District Attorney of the County of Alameda, such leave was granted, and, ultimately,

a Third Amended Complaint, which is attached hereto as Appendix D, was filed.

The District Court, on motions of all respondents, ordered the action dismissed "on the sole ground . . . that no claim can arise under the Civil Rights Acts for acts occurring after the death of plaintiff," Tyrone Guyton.

Final judgments were entered in favor of respondents D. Lowell Jensen, Charles Edward Herbert, Donald Whyte, Lawrence Holman, Edward Hilliard, George T. Hart, Thomas Donahue, Walter Prentice, Conrad Blevins, John Robert Lothrop, and James F. Donovan. The action remains pending as to the three Emeryville police officers, Dale Phillips, Thomas Mierky, and William Mathews.

Petitioner appealed to the Court of Appeals for the Ninth Circuit, which rendered an opinion dismissing the appeal on substantially the same ground cited by the District Court. (Appendix A.)

The facts upon which this action is based, gleaned almost entirely from newspaper accounts and portions of investigative records made available to petitioner, are substantially as follows:

On November 1, 1973, Phillips and Mierky were apparently on a narcotics stake-out in Emeryville, near the Oakland border. They observed two youths, over some period of time, attempting to start a parked

vehicle, but made no inquiry of their purpose. One of the youths evidently was Tyrone Guyton, a 14-year-old slightly built black youth. Eventually the vehicle was started and the youths drove away. Phillips and Mierky then gave chase and the vehicle headed toward Guyton's home. In the course of the chase, the Phillips-Mierky vehicle rammed the rear of the Guyton vehicle, throwing it out of control. Tyrone exited the vehicle and commenced running. His vehicle was then crashed by another vehicle driven by Mathews. Phillips and Mierky fired approximately 10 shots from their hand guns at the fleeing youth, and one shot struck him in the buttocks, knocking him to the ground. The angle of penetration of this bullet was such as to demonstrate that the youth was in full stride with his back to the pursuing officers at the time of impact.

As the youth lay prostrate on the ground, one of the officers, believed to be Mathews, fired a round into the youth's back fatally wounding him. The angulation of this bullet was such as to demonstrate that the officer firing the shot was but a few feet from the prostrate youth and that the youth was face down when the shot was fired.

Shortly thereafter units from the Oakland Police Department, and respondent James F. Donovan, the Chief of the Emeryville Police Department, began arriving at the scene. The initial investigation was then joined by members of the Alameda County Dis-

trict Attorney's office. As the investigation expanded, all respondents came to be a part of it and played varying roles in shaping its scope and direction.

Initial reports made no mention of the fatal last shot. In both initial reports and subsequently thereto, the investigation focused on the claims that the youth had, shortly after exiting his car, turned and fired upon the pursuing officers with a small caliber hand gun. No such weapon was found. Neutron activation tests, the results of which came forth long after the positions of the participants and investigators had become a matter of official record, were taken of the youth's hands, and no evidence of his having fired a weapon was found. Officer Mathews reported that he saw a flash of fire emanate from the alleged weapon. Officers of the Oakland Police Department, in their patrol vehicles at varying distances away from the scene, the least of which was in excess of a block, reported hearing the sound of a small caliber weapon fire, followed by the louder reports of the heavier police weapons. At subsequent Grand Jury hearings, had after the report of the negative neutron activation test was returned from the Washington Laboratory, the District Attorney's office presented the Grand Jury with a CO^2 type pistol, not as the weapon allegedly held by Tyrone Guyton the night he was killed, but as the kind of weapon which would not leave deposits on the victim's hands ascertainable as the result of neutron activation tests. CO^2 weapons

do not flash fire. CO^2 weapons are not audible a block or more away.

The three Emeryville police officers testified before secret Grand Jury proceedings, conducted under California law by the District Attorney's office, but thereafter refused to give any testimony concerning the events leading up to and surrounding the killing of Tyrone Guyton in subsequent civil deposition proceedings as a part of this action, claiming the privilege of the 5th Amendment of the United States Constitution against self-incrimination, which claims continued after the county Grand Jury refused to return indictments.

The conduct and reports of the investigations by respondents showed a conscious plan to cover up and conceal from the public and petitioner the true facts and circumstances of what amounted to the cold-blooded hunting down and murder of this 14-year-old black youth by members of Emeryville Police Department, and a conscious joining in by respondents of the killers' plans and efforts to conceal their culpability in the matter. The pleadings of the Third Amended Complaint (Appendix D) fully and fairly alleged such conspiracies and conduct.

The pertinent charging allegations were that the defendants Phillips, Mierky and Mathews conspired with each other to inflict severe bodily harm upon

petitioner, to give false and misleading statements concerning the events of the shooting, and to take petitioner's life, for the purpose of concealing their wrongful acts, for the purpose of impeding, hindering, obstructing, and defeating the due course of justice, and with the purpose and intent of inflicting cruel and unusual punishment on petitioner, of depriving him of his life without due process of law, of depriving him of his rights to a speedy and public trial, by an impartial jury, on charges of crime which said defendants may have believed him to have committed, to be informed of the nature and cause of the accusation against him, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and for the purpose and with the intent of depriving him of the equal protection of the laws. (App. D, Par. VIII.) It was alleged that the wounds so inflicted upon plaintiff were the cause of his death, and that their infliction was pursuant to the joint plan, design and agreement of the three police officers. (App. D, Par. VI) The three defendant police officers were alleged to have been acting under color of state law in doing these wrongful acts. (App. D, Par. II.) The fact that they were dealing with a 14-year-old minor Negro child were alleged to be known to said defendants at all times referred to in the complaint. (App. D, Par. V.) Petitioner, by reason of said defendants' wrongful acts, was caused to

suffer extreme pain, fright, nervous shock, and death. (App. D, Par. VI.)

It was further alleged that immediately following the killing of petitioner, and from time to time thereafter, each of the named respondents herein, James F. Donovan, John Robert Lothrop, Conrad Blevins, Waller Prentice, Thomas Donahue, George T. Hart, Edward Hilliard, Lawrence Holman, Donald Whyte, Charles Edward Herbert, and D. Lowell Jensen, all acting under color of state law in the capacities described in Pars. II, III and IV of Appendix D, joined said conspiracy, knowing the true nature of the acts of the three police officers and knowing the nature, aims and objectives of the initial conspiracy. It was alleged that respondents agreed to and did in fact so act as to further the aims and objectives of the conspiracy by so investigating the facts and circumstances surrounding the killing of petitioner, by giving and receiving false statements pertaining thereto, which statements were known by said respondents to be false, and by gathering, sequestering, transmitting, and concealing and attemtping to conceal all evidence tending to incriminate the three Emeryville police officers, the true facts and circumstances of plaintiff's killing, and the civil and criminal liability of the three officers for their wrongful acts, from petitioner, his representatives, public agencies and the general public. Such acts done in furtherance of the initial conspiracy were alleged to have been done for the further wrongful purpose of pre-

venting petitioner and his representatives from obtaining evidence establishing the civil liability of the three officers, for the purpose of preventing and stifling public indignation concerning the wrongful acts of all defendants, including respondents, and for the purpose of depriving petitioner of his constitutionally guaranteed right to have his wrongful killing vindicated by state action and to have his killers, their aiders, abettors, and co-conspirators brought to justice. (App. D, Par. IX.)

Petitioner further alleged that the defendants, including respondents, and pursuant to the foregoing conspiracy and for the purpose of aiding its wrongful aims, instituted and participated in two investigations by the Alameda County Grand Jury and knowingly presented and aided in the presentation of false, perjurious, and misleading testimony and evidence, which testimony and evidence was known by respondents to be false, perjurious and misleading, which testimony and evidence tended to exculpate the three Emeryville officers from wrong-doing in the killing of petitioner, and that respondents knowingly withheld from the Grand Jury substantial evidence establishing the culpability of said officers. (App. D, Par. X.)

The concluding charging allegations were that all defendants, including respondents, in conspiring and doing the wrongful acts referred to above, had acted

with the wrongful, purposeful, conscious, and malicious intent of depriving plainitff of each of the rights referred to above guaranteed to him by the United States Constitution. (App. D, Par. X.)

REASONS FOR GRANTING WRIT

The most compelling reason for granting certiorari is that the kind of conduct by respondents for which redress is sought simply cannot be tolerated in a democratically organized and constitutionally based society. There can be nothing more repugnant to our fundamental concepts of justice than a systematic and conscious cover-up by the police and prosecuting attorney's office of an unlawful homicide, whether of a 14-year-old black youth or any other person, by police officers. The killing of the youth, as an act in itself, shocks the conscience. But the three officers only delivered lethal blows to one human being; the respondents herein, by their conduct, have struck at the heart of our system of justice. Such conduct shreds the very fabric of our society.

Petitioner believes most profoundly that organized society cannot be maintained in the United States by violence alone, or even by violence in any marked degree. Authoritarian social orders have existed and still exist for extended periods of time on the basis of violence, both expressly and tacitly sanctioned by the state, or, what amounts to the same, by those individuals who control the various organs of the

state. But in the United States, while the ideals and forms of law and justice run strong and deep, there is also, just below the surface of our consciousness, a propensity for and fascination with violence. It, too, is our history, our reality. Thus, there comes the conviction that our society not only *ought* to be organized on the basis of a freely given and earned respect for law and belief in justice, but that it *must* be if it is to endure.

Such an abiding respect for law can be maintained only by the daily patient, equal and impartial application of the law and its forms by those charged with its enforcement.

As Mr. Justice Brandeis wrote in his dissent in *Olmstead* v. *United States* (1928) 277 US 435, 438:

> Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.
>
> * * *
>
> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. For good or for ill, it teaches the whole people by its example.

The task of a court, when faced with the realities of a given case, is to apply the forms of law as they exist, whether statutory or constitutional, to the

attainment of the statutory and constitutional objectives as they are perceived by the court. The mechanisms of the judicial process deal with such elemental concepts as rights, duties and remedies.

In the instant case we are dealing with the broad, often confusing, and sometimes entirely omissive language of the 14th Amendment and the Civil Rights Acts, concerning which this Court, in *United States* v. *Price* (1965) 383 US 787, 801, and *Jones* v. *Mayer* (1967) 392 US 409, 437, stated:

> "We think that history leaves no doubt that if we are to give [the Civil Rights Acts] the scope that its origins dictate, we must accord it a sweep as broad as its language."

The Ninth Circuit Court of Appeals has, unless this Court intervenes, remarkably narrowed the scope of the Civil Rights Acts by ruling that *none* of its provisions have any force or effect, that *no* remedy whatsoever exists, that *no* redress can be obtained, for actions by state officials who (1) join an ongoing conspiracy to cover-up a police assault and murder and act to further its aims, and (2) who themselves conspire and act to cover up such wrongful acts, where the victim dies *before* they joined the conspiracy and acted. In effect, the Ninth Circuit has held that the Civil Rights Acts were not intended to provide redress where the victim of unlawful and unconstitutional conduct by state officers died as a result of such conduct.

But such most certainly was not the historical thrust of the Civil Rights Acts. People *were* being killed to deprive them or discourage them in the exercise of their constitutionally guaranteed rights, whether under color of state law or as the result of conspiracies. And state officials *were* conspiring and acting to shield and protect the killers from the legal consequences of their misconduct—they *were* obstructing justice.

See *Monroe* v. *Pape* (1960) 365 US 167, 171-176, 180, for extensive discussion of and quotations from Congressional and Presidential records.

The clear thrust of the 14th Amendment and the Civil Rights Acts, both in historical purpose and by plain language, was to proscribe, and to provide redress for, the failure of state agencies to provide citizens with the protection of the laws and their offices, the ultimate goal being to encourage state officials to enforce the law equally and impartially. By historical purpose and plain language, the Civil Rights Acts forbid the state to use its offices in the manner and for the purposes charged in the subject action.

The Civil Rights Acts contain language, and to some degree suggest procedures, evidencing concern with (1) compensation to the victim, and (2) punishment of the wrongdoer. These elements have been the subject of some concern by this Court. (E.g., *Robertson* v. *Wegmann* [1978] 436 US 584.) But, it is sub-

mitted, these elements are not mutually exclusive. Analytical jurisprudence regards the obligation to pay damages as being conceptually the same as punishment of the wrongdoer; it is the *sanction* imposed by the legal order against one whose conduct is contrary to that which the law requires. The desired conduct is perceived as a *norm;* contrary conduct is perceived as a *delict.* (See Kelsen, *General Theory of Law and State,* Harvard University Press [1946], pp. 30-57.) The end of all law is to control human behavior; the end of the Civil Rights Acts is to control certain specifically defined human behavior. The encouragement of the desired behavior and the deterrence of the undesired behavior are accompanied by the same mechanism, the possibility of or the actual imposition of the sanction. Without the sanction, there is no law.

Thus, to confine one's analysis of a given statute to "rights," is to misperceive the true nature of law and its relationship to human behavior. "There is no legal right for someone without a legal duty for someone else. The contents of a right is ultimately the fulfillment of someone else's duty." (General Theory of Law and State, supra, p. 76.) Such misperceptions may lead to anomalous and even generally undersirable judicial conclusions.

Thus, by focusing their attention on "rights," as distinguished from "duties" i.e., proscribed conduct, and "remedies," the courts below, with medieval logic, held that petitioner is a dead person; a dead person

is a mere corpse, a body, and can have no rights to be invaded. Therefore any acts done by respondents after Tyrone Guyton's death, *even if they were in furtherance of an unfulfilled conspiracy which commenced before his death,* are not actionable or subject to redress, either by the deceased person, or by his duly appointed legal representative, or by his mother. The conduct may be wrong, but there is no legal remedy!

Such analysis completely ignores the point that the Civil Rights Acts were enacted to deter certain conduct, that they imposed duties on individuals and state officers to refrain from certain conduct, and that remedies to obtain redress for such conduct were both expressly and impliedly provided by the Acts. It ignores the statutorily expressed distinction between "person" and "party." (E.g., §1983, 1985[3], 1986.) It ignores the mandate of §1988. It ignores the many decisions of this Court and other Federal Courts whereby remedies have been "fashioned" and nice procedural distinctions overcome in order to give reasonable effect to salutary statutory and constitutional purposes.

See, e.g., *Marbury* v. *Madison* (1803) 5 US 137, 163; *Texas Pacific Ry.* v. *Rigsby* (1915) 241 US 33, 39-40; *Clearfield Trust Co.* v. *United States* (1942) 318 US 363, 366-367; *Bell* v. *Hood* (1946) 327 US 678, 684; *J. I. Case Co.* v. *Borak* (1964) 377 US 426, 433; *Sullivan* v. *Little Hunting Park* (1969) 396 US

229, 239; *Bivens* v. *Six Unknown Named Agents* (1971) 403 US 388.

In this connection, we believe that the concepts of "person" and "party," both in terms of the individual or entity authorized by law to institute the mechanisms by which the sancion is imposed, and in terms of the individual or entity injured by the conduct proscribed by the statute, deserve this Court's close analysis. In the instant case we have alleged injury to both Tyrone Guyton, whose right to life was invaded, and injury to his Estate, which has been precluded from knowing the full facts and circumstances surrounding his homicide by respondents' conduct. Among other things, we presented to the courts below the concept, the adequate development of which is beyond the scope of this petition, that the right to life carries with it the right to have one's unlawful homicide vindicated and not impeded by state action. In *Roe* v. *Wade* (1972) 410 US 113, this Court was faced with questions concerning the beginnings of life and resolved those questions in terms of the egigencies of day to day living and the state's interest in controlling certain conduct. In the instant case, this Court may face questions concerning the ending of physieal life, and may choose to resolve those questions in similar terms. Such questions as the meaning and scope of the "right to life" would appear to be of substantial interest. We believe they are capable of resolution consistent with the purposes of the constitutional and statutory enactments at hand.

Finally, we think this Court particularly should be concerned with the pernicious precedential effect of the Ninth Circuit's opinion. The plain meaning of this opinion—and one which doubtless will not be lost to many overly zealous police and public prosecutors —is that if the police beat a victim into quadriplegia, insanity, or even that state of medically maintained "life" by which the victim is described as a "vegetable," an action for damages under the Civil Rights Acts may be maintained, either by the victim or by his duly appointed legal representative, not only against the initial wrongdoers, but against those state officers who seek to cover-up and protect them from the legal consequences of their acts, but that if the police take one more shot—as here—or inflict one more blow and kill the victim, then state officials may cover-up and protect them *ad limitum!*

To underscore our belief in the importance of this case, we need only refer to the comments of the Chief Justice in *Blivens* v. *Six etc. Agents*, supra, 403 US 415:

> "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric."

Petitioner is prepared to fully brief the statutory, precedential, and jurisprudential predicates for such a remedy in the instant case.

Again, we defer to the Chief Justice in *Blivens*, supra, 403 US 419:

> "I wonder what would be the judicial response to a police order authorizing '"shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter."

To which we might add, "Even if he is a 14-year-old black child."

We share the outrage, but we deem it appropriate to seriously question whether any police department would be so benighted as to *expressly* promulgate such an order. How much easier it would be to have no order or policy whatsoever officially expressed, as in the instant case, and let events take their course, secure in the knowledge that those who transgress good reason and general law will be shielded by their peers, their superiors, and by the public prosecutor?

The Chief Justice, whose concern we deeply share, continued in *Blivens* 403 US 421, to foresee just such a case as is presented by this petition:

> "Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed — that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat over-ruling of the suppression doctrine cases."

We, of course, are not concerned with the judicial policy expressed in the suppression of evidence cases. However, we are directly concerned with maintaining the efficacy of civil remedies seemingly intended to afford redress for wrongs inflicted by law enforcement officials. Not only has the opinion of the Ninth Circuit removed all constitutional and statutory restraints on obstruction of justice conduct, where the initial misconduct results in the death of the victim, but it deprives—and petitioner has so alleged in his complaint—the injured party from obtaining that very evidence which would directly prove the initial misconduct, leaving such party to construct his civil action as best he can from such isolated bits and pieces of evidence as may inadvertently drift past the official screen, and such inferences as may be drawn therefrom. In the usual case, this is tantamount to leaving the injured party with no remedy at all, an empty right devoid of all substance by reason of the lack of evidence.

And we are directly concerned, as discussed above, with the loss of an effective remedy in precisely that

situation where the constitutional invasion is the greatest, the right to life, the *sine qua non* of all other rights.

CONCLUSION

Because of the fundamental constitutional and statutory questions raised by this case, and the implications of the rulings of the courts below, a writ of certiorari should issue to the Ninth Circuit Court of Appeals.

Dated: San Leandro, California, November 27, 1979.

Respectfully submitted,

LEW WARDEN
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed August 16, 1979, Emil E. Melei, Jr., Clerk

TYRONE GUYTON, a deceased minor, by MATTIE SHEPHERD, Administratrix of the Estate of TYRONE GUYTON, deceased,

Appellant,

VS.

DALE PHILLIPS, THOMAS MIERKY, WILLIAM MATHEWS, JAMES F. DONOVAN, JOHN ROBERT LOTHROP, CONRAD BLEVINS, WALLER PRENTICE, THOMAS DONAHUE, GEORGE T. HART, EDWARD HILLIARD, LAWRENCE HOLMAN, DONALD WHYTE, CHARLES EDWARD HERBERT, D. LOWELL JENSEN,

Appellees.

No. 76-1951

OPINION

Appeal from the United States District Court for the Northern District of California

Before: SMITH*, WALLACE and HUG, Circuit Judges
HUG, Circuit Judge

This appeal involves the question of whether a claim may be stated under the Civil Rights Act for a violation of the civil rights of a deceased person resulting from the alleged actions of public officials after the death of the decedent, in covering up and

*The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

failing to prosecute properly the persons who killed the decedent.

The Administratrix of the Estate of Tyrone Guyton brought this action for damages under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, 28 U.S.C. § 1343,[1] alleging violation of constitutional rights guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution. The third amended complaint alleges that defendants Dale Phillips, Thomas Mierky and William Mathews, police officers employed by the City of Emeryville, California, acting in the course of their official duties, shot and wounded Tyrone Guyton, and then, while he was face down on the ground, shot and killed him. The complaint further alleges that the three officers conspired with each other to inflict bodily harm upon Guyton, to give misleading statements concerning the events, and to take Guyton's life for the purpose of concealing their wrongful acts, which conspiracy was in violation of Guyton's civil rights.

The third amended complaint also alleged claims against appellees James F. Donovan, the chief of police of the City of Emeryville; John Robert Lothrop, Conrad Blevins, Waller Prentice, Thomas Donahue and George T. Hart, police officers employed by the City of Oakland, California; Edward Hilliard and Lawrence Holman, inspectors employed by Alameda County, California; and D. Lowell Jensen, Donald Whyte and Charles Edward Herbert, the district attorney and deputy district attorneys of Alameda County. The claims against these defendants alleged that, following the death of Tyrone Guyton, they joined the conspiracy of Phillips, Mierky and Mathews, the three police officers who shot Guyton, to cover up and conceal the officers' actions to prevent their prosecution; and that, in furtherance of the conspiracy, they presented false information and concealed information to obscure the true facts, all in violation of 42 U.S.C. §§ 1983 and 1985 and the United States Constitution.

The district court dismissed the action against all defendants except officers Phillips, Mierky and Mathews, on a motion under Fed.R.Civ.P. 12(b), for failure to state a claim upon which relief can be granted. The claims against the officers who shot Guyton were not dismissed and remain before the trial court. This appeal, therefore, involves only the claims of a conspiracy to deprive Guyton of his civil rights by covering up the alleged wrongful actions of the police officers in shooting Guyton, not the claims for the shooting itself. The issue presented is whether the Civil Rights Act affords a cause of

[1] The appellant has also alleged a cause of action directly under the Constitution, with jurisdiction based upon the general federal question jurisdiction statute, 28 U.S.C. §1331, as recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and most recently in *Davis* v. *Passman*, 47 U.S.L.W. 4643 (June 5, 1979). The cause of action there asserted would be co-extensive with, and an alternate remedy to, that provided by 42 U.S.C. §§1983 and 1985, with jurisdiction under 28 U.S.C. §1343. The constitutional rights asserted are the same.

action on behalf of a deceased for acts occurring after the death of that person. We hold it does not and affirm the judgment of the district court

This appeal arises from a dismissal pursuant to Fed.R.Civ.P. 12(b). On review of a dismissal under Rule 12(b), the well-pleaded facts alleged in the complaint are to be accepted as true. *Cal. Dump Truck* v. *Associated Gen. Contractors*, 562 F.2d 607, 614 (9th Cir. 1977). A complaint should be dismissed only if it appears beyond a doubt that plaintiff could prove no set of facts in support of his claim which would entitled him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Cal. Dump Truck*, 562 F.2d at 614. We therefore presume the truth of all of the allegations in the complaint.

We find that the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occurred after his death. A "deceased" is not a "person" for the purposes of 42 U.S.C. §§ 1983 and 1985, nor for the constitutional rights which the Civil Rights Act serves to protect.

Generally, the term "person," as used in a legal context, defines a living human being and excludes a corpse or a human being who has died. 70 C.J.S. Person § 1 (1951); 32 Words and Phrases, Person, pp. 287, 309 (1965); *Telefilm* v. *Superior Court*,

194 P.2d 542, 547 (1948); *Lawson* v. *State*, 24 S.E.2d 326, 328 (1943); *Brooks* v. *Boston and N. St. Ry. Co.*, 97 N.E. 760 (1912); *Morton* v. *Western Union Tel. Co.*, 41 S.E. 484, 485 (1902). There is no indication in the legislative history of the Civil Rights Act that Congress meant to depart from this general meaning of the word "person" when it used the term in 42 U.S.C. § 1983, nor do we find any case law which would imply that the protection of the Civil Rights Act would extend to dead human beings.

To the contrary, relevant cases suggest that the definition of a "person" for purposes of protection of constitutional rights is limited only to a living human being. In *Roe* v. *Wade*, 410 U.S. 113, 158 (1973), the Supreme Court held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. Likewise, a fetus is not a "person" under the Civil Rights Act. *McGarvey* v. *Magee-Womens Hospital*, 340 F. Supp. 751 (W.D.Pa. 1972), aff'd 474 F.2d 1339 (3d Cir. 1973).

The situation presented by this appeal should not be confused with that presented when a plaintiff, on behalf of a deceased, challenges actions committed *before* the deceased's death as violations of the Civil Rights Act. In the latter case, the cause of action survives the complainant's death, if it is a cause of action that survives under the appropriate state law. *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). In

the present case, all of the alleged actions of the appellees occurred after Guyton's death and thus were not violations of a "person's" civil rights.

Appellant argues that the actions of the appellees in refusing to prosecute the three officers who shot Guyton relate back to the time before his death, on the theory that appellees were co-conspirators with the officers who violated Guyton's civil rights during his lifetime. However, the conspiracy with which the three officers are charged is a conspiracy to deprive Guyton of his civil rights; and, inasmuch as Guyton's civil rights must terminate with his death, so must any conspiracy to deprive him of those rights.

Appellant urges us to extend the reach of the Civil Rights Act to actions which occur after the death of the person whose civil rights are allegedly violated, on the theory that if the Civil Rights Act is to be given the scope that its origins dictate, it must be interpreted broadly. We decline to accept appellant's argument. There is no indication that Congress intended the Civil Rights Act to provide a cause of action for representatives to recover on behalf of a deceased for actions committed after the deceased's death.

We hold that the appellant has no cause of action against appellees under the Civil Rights Act or the Constitution and that the district court's dismissal was proper.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed October 29, 1979, Richard H. Deane, Clerk

TYRONE GUYTON, a deceased minor, by MATTIE SHEPHERD, Administratrix of the Estate of TYRONE GUYTON, deceased,

Plaintiff-Appellant,

vs.

DALE PHILLIPS, THOMAS MIERKY, WILLIAM MATHEWS, JAMES F. DONOVAN, JOHN ROBERT LOTHROP, CONRAD BLEVINS, WALLER PRENTICE, THOMAS DONAHUE, GEORGE T. HART, EDWARD HILLIARD, LAWRENCE HOLMAN, DONALD WHYTE, CHARLES EDWARD HERBERT, D. LOWELL JENSEN,

Defendant-Appellee.

No. 76-1951

ORDER

Appeal from the United States District Court for the Northern District of California

Before: SMITH*, WALLACE and HUG, Circuit Judges

*The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing filed by the appellant on August 29, 1979.

The petition for rehearing is denied.

APPENDIX C

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1984.

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

42 U.S.C. §1985.

(1) If two or more persons in any State or Territory conspire to prevent by force, intimidation, or threat, any person from accepting or holding any office, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States, from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness

in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the elec-

tion of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1986.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act

and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. §1988.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Filed January 7, 1976, William L. Whittaker, Clerk

TYRONE GUYTON, a deceased minor, by MATTIE SHEPHERD, Administratrix of the Estate of TYRONE GUYTON, deceased, *Plaintiff,* vs. DALE PHILLIPS, THOMAS MIERKY, WILLIAM MATHEWS, JAMES F. DONOVAN, JOHN ROBERT LOTHROP, CONRAD BLEVINS, WALLER PRENTICE, THOMAS DONAHUE, GEORGE T. HART, EDWARD HILLIARD, LAWRENCE HOLMAN, DONALD WHYTE, CHARLES EDWARD HERBERT, D. LOWELL JENSEN, *Defendants.*	**No. C 74 0357 CBR** **Third Amended Complaint for Damages —Civil Rights Acts**

Plaintiff complains of the defendants, and each of them, and for Cause of Action alleges as follows:

I.

Each cause of action of this Third Amended Complaint, and the jurisdiction of this Court for the adjudication thereof, arises under the laws of the United States, more particularly, 42 USC §§ 1983, et al., generally known as the Civil Rights Acts, 28

USC § 1331, and the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution. The amount in controversy, exclusive of interests and costs, exceeds $10,000.00.

II.

At all times herein mention, the defendants Dale Phillips, Thomas Mierky, and William Mathews, and each of them, were police officers employed by the City of Emeryville, a municipality of the State of California, and the defendant James F. Donovan was the Chief of Police of said City of Emeryville. In doing the wrongful acts herein alleged, said defendants, and each of them, were purporting to act within the course and scope of their official duties and under color of State law.

III.

At all times herein mentioned, the defendants John Robert Lothrop, Conrad Blevins, Waller Prentice, Thomas Donahue, and George T. Hart, were police officers employed by the City of Oakland, a municipality of the State of California. In doing the wrongful acts herein alleged, said defendants, and each of them, were purporting to act within the course and scope of their official duties and under color of State law.

IV.

At all times herein mentioned, the defendants Edward Hilliard, and Lawrence Holman were inspec-

tors employed by the County of Alameda, a political subdivision of the State of California, the defendants Donald Whyte and Charles Edward Herbert were Deputy District Attorneys employed by said County of Alameda, and D. Lowell Jensen was the elected District Attorney of said County of Alameda. In doing the wrongful acts herein alleged, said defendants, and each of them, were purporting to act within the course and scope of their official duties and under color of State law.

V.

At all times herein mentioned, the plaintiff was a minor child of the Negro race, fourteen years of age, and such facts were known by said defendants, and each of them.

VI.

On or about November 1, 1973, in the vicinity of 33rd and West Streets, in the City of Oakland, County of Alameda, State of California, by reason of gunshot wounds inflicted upon plaintiff by one or more of the defendants Dale Phillips, Thomas Mierky, and William Mathews, plaintiff was caused to suffer extreme pain, fright, nervous shock, and death. Plaintiff is informed that the defendant Thomas Mierky, as plaintiff's back was turned to said defendant, fired approximately eight (8) rounds of a disintegrating type banned by International Law for use in warfare and commonly known as dum-dum bullets at

plaintiff. Plaintiff is presently unable to determine whether any, or all, or parts of said bullets struck plaintiff. Plaintiff is informed that the defendant Dale Phillips, as plaintiff's back was turned to said defendant, fired one or more rounds at plaintiff, one of which struck plaintiff in the buttocks, knocking him prostrate upon the ground. Plaintiff is informed that the defendant William Mathews, while plaintiff was lying prostrate and helpless face down upon the ground, fired one round into plaintiff's back. Plaintiff is also informed that it was the defendant Dale Phillips who fired the round into plaintiff's back as he lay prostrate upon the ground. By reason of said conflicting information and the refusal of said defendants, and each of them, to give testimony on the grounds that their answers to plaintiff's questions might incriminate them, plaintiff is unable to allege with certainty which of said defendants fired which of said rounds. Plaintiff is informed and so believes and therefore alleges that wounds inflicted upon plaintiff by the defendants Dale Phillips, Thomas Mierky, and William Mathews, individually and pursuant to the joint design, plan and agreement of said defendants, were the immediate and proximate causes of plaintiff's injuries and death, as herein alleged.

VII.

At all times herein mentioned, said Defendants Dale Phillips, Thomas Mierky, and William Mathews,

and each of them, had knowledge that said wrongful acts, and each of them, were about to be committed, and had the power to prevent or aid in the commission of the same, and neglected and/or refused to do so. Had said defendants, and each of them, exercised reasonable diligence in preventing said wrongful acts, and each of them, said wrongful acts, and each of them, would not have been committed.

VIII.

The defendants Dale Phillips, Thomas Mierky, William Mathews, and each of them, did conspire together and with each other to inflict severe bodily harm upon the person of plaintiff, and to give false and misleading statements of their actions and the actions of plaintiff leading up to and concerning their shooting of plaintiff, and to take plaintiff's life, for the purpose of concealing their wrongful acts and the wrongful acts of each of them, and for the purpose of impeding, hindering, obstructing, and defeating the due course of justice, and with the wrongful, purposeful, and malicious intent of inflicting cruel and unusual punishment upon plaintiff, of depriving plaintiff of his life without due process of law, of depriving plaintiff of his rights to a speedy and public trial, by an impartial jury, on charges of crime which the defendants and each of them, may have believed plaintiff to have committed, to be informed of the nature and cause of the accusation against him, to be confronted with any wit-

nesses against him, to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and of depriving him of the equal protection of the laws.

IX.

Immediately following the killing of plaintiff, as aforesaid, and from time to time thereafter, the defendants James F. Donovan, John Robert Lothrop, Conrad Blevins, Waller Prentice, Thomas Donahue, George T. Hart, Edward Hilliard, Lawrence Holman, Donald Whyte, Charles Edward Herbert, D. Lowell Jensen, and other persons acting under color of State law whose identities are not presently known to plaintiff, joined said conspiracy, knowing the true nature of the acts of the defendants Dale Phillips, Thomas Mierky, William Mathews, and each of them, and knowing the nature, aims and objectives of said conspiracy, and did agree to and did in fact give aid to and further the aims and objectives of said conspiracy, by investigating the facts and circumstances concerning the killing of plaintiff, as aforesaid, by giving and receiving false statements pertaining thereto, which said statements were known to be false by said defendants, and each of them, and by so gathering, sequestering, transmitting and concealing and attempting to conceal all evidence tending to incriminate said defendants Dale Phillips, Thomas Mierky, William Mathews, and each of them, as to conceal from plaintiff, plaintiff's representatives, pub-

lic agencies other than the Office of the District Attorney of Alameda County, and the general public, the true facts and circumstances of the killing of plaintiff as aforesaid and the civil and criminal liability of said defendants Dale Phillips, Thomas Mierky, William Mathews, and each of them, therefor, for the further wrongful and malicious purpose of preventing plaintiff and plaintiff's representatives from obtaining relevant and material evidence establishing the civil liability of the said defendants Dale Phillips, Thomas Mierky, William Mathews, and others, for the further wrongful and malicious purpose of preventing and stifling public indignation concerning said wrongful acts, and each of them, and for the further wrongful and malicious purpose of depriving plaintiff of his Constitutionally guaranteed right to have his wrongful killing vindicated by State action and his killers, their aiders, abettors, and co-conspirators brought to justice.

X.

Pursuant to said conspiracy, and for the purpose of aiding its wrongful aims, and each of them, as aforesaid, the defendants, and each of them did institute and participate in two investigations by the Grand Jury of Alameda County, and did knowingly present and aid in the presentation of false, perjurious, and misleading testimony and evidence, which testimony and evidence was known by the defendants, and each of them, to be false, perjurious and mis-

leading, and which said testimony and evidence tended to exculpate the defendants Dale Phillips, Thomas Mierky, William Mathews, and each of them, from wrongdoing in the killing of plaintiff as aforesaid, and did knowingly withhold from said Grand Juries, and each of them, substantial evidence establishing the culpability of said defendants Dale Phillips, Thomas Mierky, William Mathews, and each of them, and did so present evidence to said Grand Juries, and each of them, as to obscure and confuse the true facts and circumstances surrounding the killing of plaintiff, as aforesaid.

X.

In so conspiring, and doing the wrongful acts hereinabove alleged, and each of them, the defendants, and each of them, acted with the wrongful, purposeful, conscious, and malicious intent of depriving plaintiff of the rights, and each of them, hereinabove alleged guaranteed to plaintiff by the Constitution of the United States.

XI.

By reason of the premises, plaintiff has been generally damaged by the defendants, and each of them, in the sum of $5,000,000.00.

XII.

In doing the wrongful acts herein alleged, the defendants, and each of them, acted oppressively, fraud-

ulently, and maliciously, with the intent of injuring and damaging plaintiff, and exemplary damages ought to be assumed against said defendants, and each of them, in the sum of $15,000,000.00 by way of example and to deter similar conduct by themselves and others.

XIII.

On or about December 31, 1973, by order of the Superior Court of the State of California, in and for the County of Alameda, Mattie Shepherd, the natural mother of the plaintiff Tyrone Guyton, deceased, was duly appointed Administratrix of the Estate of Tyrone Guyton, deceased.

Dated: January 2, 1976.

LEW WARDEN
Attorney for Plaintiff

(Verification and Proof of Service of Third Amended Complaint Omitted.)

Supreme Court, U. S.
FILED
FEB 8 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1075

TYRONE GUYTON, a deceased minor, by MATTIE SHEPHERD, Administratrix of the Estate of TYRONE GUYTON, deceased,

Petitioner,

vs.

D. LOWELL JENSEN, CHARLES EDWARD HERBERT, DONALD WHYTE, LAWRENCE HOLMAN, EDWARD HILLIARD, GEORGE T. HART, THOMAS DONAHUE, WALLER PRENTICE, CONRAD BLEVINS, JOHN ROBERT LOTHROP, and JAMES F. DONOVAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1075

TYRONE GUYTON, a deceased minor, by
MATTIE SHEPHERD, Administratrix of the
Estate of TYRONE GUYTON, deceased,
Petitioner,

vs.

D. LOWELL JENSEN, CHARLES EDWARD HERBERT,
DONALD WHYTE, LAWRENCE HOLMAN,
EDWARD HILLIARD, GEORGE T. HART, THOMAS DONAHUE,
WALLER PRENTICE, CONRAD BLEVINS,
JOHN ROBERT LOTHROP, and JAMES F. DONOVAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 606 F.2d 248. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Can a plaintiff state a claim for which relief can be granted under the Civil Rights Act for alleged actions of public officials which occurred after the death of plaintiff?

STATEMENT OF CASE

Petitioner, a deceased minor, brought an action through the administratrix of his estate by a complaint for damages alleging violation of his civil rights. The complaint alleged that petitioner was shot and killed by three police officers, defendants Dale Phillips, Thomas Mierkey, and William Matthews. The third amended complaint in that action also alleged claims against James F. Donovan and the other respondents to this Petition.

Petitioner has not alleged that James F. Donovan or the other respondents performed any acts or participated in any conspiracy prior to the death of plaintiff. Rather, the complaint alleges that *after* the death of plaintiff, Donovan and the other respondents participated in a conspiracy with the three police officers.

The district court dismissed the action against Donovan and the additional respondents for failure to state a claim upon which relief can be granted. Petitioner's claims against the three police officers, defendants Phillips, Mierkey and Matthews, have not been dismissed and are pending before the district court. In addition to the action pending in the district court, a state court action seeking damages for wrongful death has been filed by the administratrix of the petitioner's estate against the three police officers and their employer, the City of Emeryville, and that action is presently pending in the Superior Court of California, County of Alameda.

Because petitioner seeks review of a dismissal pursuant to Fed. R. Civ. P. 12(b), the facts alleged in the third

amended complaint (Appendix D of Petition) are to be accepted as true for the purpose of any review. However, petitioner has set forth numerous additional allegations of "fact" in his Petition which are not contained in the third amended complaint (the "Statement of the Case" portion of the Petition is longer than the third amended complaint). Those assertions not found in the third amended complaint and not supported by the record, should be disregarded.

REASONS FOR DENYING WRIT

Petitioner has made no attempt to discuss the considerations set forth in Supreme Court Rule 19 and, accordingly, has failed to show "special and important reasons" for granting the writ of certiorari. Because there is neither conflict of decision nor an important question of federal law preesnted by the facts of this case, petitioner has opted for a misstatement of remedies as a reason for granting the writ, stating that "[i]n effect, the Ninth Circuit has held that the Civil Rights Acts were not intended to provide redress where the victim of unlawful and unconstitutional conduct by state officers died as a result of such conduct." (Petition at 14.) In fact, as the third amended complaint makes clear, petitioner has not alleged that his death resulted from conduct of respondents, and his action for redress for his death against those whom he claims to have caused it is still pending in two trial courts.

The considerations enumerated in Rule 19 are not satisfied by this Petition and the writ should not be granted. There is no conflict of decision. Petitioner has cited no case which conflicts with the opinion rendered by the Ninth Circuit in this case. In fact, the issue presented was treated as a novel one by both the district court and the Ninth Circuit Court of Appeals.

Similarly, there is no important question of federal law presented by this case. The issue presented is of isolated significance, of importance only to the parties to this case, and does not affect the general public interest. In fact, the issue presented by this Petition can be said to affect only the respondents and not even petitioner, since the respondents have been dismissed from the underlying action while the petitioner is still prosecuting actions in two forums where he will have an effective remedy if he can prove that an actionable wrong has been done to him. Since resolution of this issue is not of widespread public interest, the writ should not be granted. As stated by Mr. Justice Frankfurter in *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 99 L.Ed. 897 (1955), "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

In addition, the writ should not be granted because the decision below is clearly correct. While the issue presented by this case is novel—neither counsel nor the lower courts have found another case discussing this precise issue—the novelty of the issue may well stem from the fact that petitioner's position is so clearly wrong that no other litigant has chosen to assert it.

Respondents do not question that a civil rights action survives the death of the plaintiff, so long as a cause of action was in existence at the time of death. *See, e.g., Hall v. Wooten,* 506 F.2d 564, 568-569 (6th Cir. 1974). In California, as in other jurisdictions, a cause of action does not accrue until the party owning it is entitled to begin and

prosecute an action thereon. *U.S. Liability Ins. Co. v. Hardinger-Hayes, Inc.,* 1 Cal.3d 586, 596, 463 P.2d 770 (1970).

While the petitioner's civil rights action against the three police officers for having caused his death has survived and is being prosecuted by his administratrix, petitioner had no cause of action against respondent at the time of his death, since by the very allegations of the third amended complaint, respondent had performed no acts and participated in no conspiracy until after the plaintiff was dead. As correctly noted by the court below, "However, the conspiracy with which the three officers are charged is a conspiracy to deprive [petitioner] of his civil rights; and, inasmuch as [petitioner's] civil rights must terminate with his death, so must any conspiracy to deprive him of those rights." 606 F.2d at 251.

Finally, there is not a compelling need for the writ to be granted because petitioner has adequate remedies in the absence of an action against respondents. Petitioner has two damage actions pending in the lower courts: a civil rights action against the three police officers in the federal trial court and a wrongful death action against the police officers and the City of Emeryville in the state court. Any judgment for damages which he obtains against the police officers must be paid by the City of Emeryville. California Government Code § 825; *MacDonald v. Musick,* 425 F.2d 373 (9th Cir.), cert. denied 400 U.S. 852 (1970); *William v. Horvath,* 16 Cal.3d 834, 548 P.2d 1125 (1976).

CONCLUSION

This is simply not a proper case for review by this Court. The decision is not in conflict with any other decision and presents no important question of federal law. Petitioner has an adequate remedy in the lower courts for the wrongs which he alleges have been done. Petitioner's desire to pursue a vendetta against additional law enforcement officials at the same time that he pursues his damages claims against the three police officers does not merit the attention of this Court. The trial court properly granted the motion of respondents to dismiss and the Court of Appeals correctly affirmed that dismissal. This Court should not disturb those findings and the petition for writ of certiorari should be denied.

DATED: February 4, 1980.

Respectfully submitted,

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Appendix 1

CALIFORNIA GOVERNMENT CODE § 825

If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.